No. 11745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of David Ciphers Dudley, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellant,

vs.

DAVID CIPHERS DUDLEY, doing business as Dave Dudley and Hollywood Leather Goods Mfg. Co., Bankrupt,

Appellee.

RESPONDENT'S REPLY BRIEF.

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Respondent's Statement of the Case.

Respondent submits that the evidence and question to be determined is clearly stated by the Referee at Transcript page 36, as follows:

> "This evidence showed that prior to his bankruptcy the bankrupt was hopelessly insolvent and contemplated going through bankruptcy for the purpose of discharging his debts. While heavily in debt and clearly insolvent and while preparing his Petition in Bankruptcy to be filed in this court approximately one week before the filing of his voluntary petition the bankrupt acquired building and loan stock of the value of $1,000.00 for the

purpose of claiming the same as exempt and preventing his creditors from realizing on this clearly non-exempt cash. He claimed the same as exempt together with household goods, furniture and wearing apparel of a value of $1050.00 and a complete set of hand carving stamps and leather working tools of a value of $1500.00. The trustee set aside the household goods, furniture and wearing apparel and the complete set of hand carving stamps and leather working tools to the bankrupt as exempt, but refused to set the shares of building and loan stock aside as exempt to the bankrupt.

"The sole question to be determined is whether or not a bankrupt on the eve of bankruptcy and with the intent to withdraw from his bankrupt estate non-exempt cash or other assets, can for that express purpose, purchase exempt property out of his non-exempt assets and have them set aside to him as exempt in definance of the rights of the rights of his creditors." (Obviously the last portion of the sentence is an error and should read "in defiance of the rights of his creditors.")

The Referee drew the conclusion that it constituted fraud on creditors to use $1,000.00 in cash to purchase property permitted by California statute to be claimed as exempt.

It is clear from his statement of the evidence that he did not consider the demeanor of the bankrupt or his appearance, but the evidence above stated which he has certified is the basis for his conclusion that it was deliberate and the conduct was unfair to creditors and therefore fraudulent.

Argument in Reply to Appellant's First and Only Point.

Honorable Leon R. Yankwich has so clearly stated the rule and the reason therefor, and the danger of adding to a California statute a requirement of solvency at the time of the acquisition of exempt property, we submit his decision [Transcript pages 49 to 60] as a clear statement of the law applicable to this appeal.

The Referee refused to follow the rule announced by this honorable Court in the case of *Turnbeaugh v. Santos,* 146 F. (2d) 168, 169:

> "The hearing was conducted by the referee with a complete misapprehension of one of the underlying principles of the homestead law, and one of the findings in a substantial aspect is grossly unfair to appellants. Over the protest of appellants' attorney, appellants were subjected to a gruelling cross-examination as to the husband's past debts existing at the time the wife made the homestead declaration, on the theory that a homestead declarant is acting in fraud of creditors in seeking to establish a homestead. To the contrary the very purpose of the homestead law is to afford a residence to debtors, which is free from their debts. This elemental underlying principle is summarized in California Jurisprudence, V. 13, pp. 477, 478, a much cited section. Cf. Montgomery v. Bullock, 11 Cal. (2d) 58, 77 P. (2d) 846; Yager v. Yager, 7 Cal. (2d) 213, 217, 60 P. (2d) 422, 106 A. L. R. 664; Gray v. Brunold, 140 Cal. 615, 620, 74 P. 303. The quoted section reads: *'The doctrine bearing upon conveyances made to hinder, delay and defraud creditors has no application to the creation of a homestead. A homestead is not invalid because the declarant is in debt, or*

declared the homestead to protect it from existing debts. This is the very purpose of the homestead laws.'"

Where California statute does not require the building and loan certificates to be purchased by a solvent debtor or within a period of time before levy by a judgment creditor, it follows for the courts to so require would be judicial legislation.

Section 6 of the Bankruptcy Act directs the allowance to the bankrupt of exemptions permitted under State Law in force at the time of the filing of the petition, as stated by the Supreme Court of the United States in *White v. Stump,* 266 U. S. 310, 5 A. B. R. (N. S.) 1:

> "The Bankruptcy Law does not directly grant or define any exemptions, but directs, in Section 6, that the bankrupt be allowed the exemptions 'prescribed by the state laws in force at the time of the filing of the petition;' in other words, it makes the state laws existing when the petition is filed the measure of the right to exemptions."

Also in *Holden v. Stratton,* 198 U. S. 202, 14 A. B. R. 94:

> "It has always been the policy of Congress, both in general legislation and in bankrupt acts, to recognize and give effect to the state exemption laws. This was cogently pointed out by Circuit Judge Caldwell, in delivering the opinion in *Steel v. Buel,* where he said (104 F. 972, 5 A. B. R. 165):
>
> "'From the organization of the Federal courts under the Judiciary Act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor exempt to him by the law of the state. Judiciary Act of 1789

(1 Stat. at L. 93, Chap. 21); *Wayman v. Southard,* 10 Wheat. 1, 32, 6 L. ed. 253, 260; *Lamaster v. Keeler,* 123 U. S. 376, 31 L. ed. 238, 8 S. Ct. Rep. 197; *Dartmouth Sav. Bank v. Bates,* 44 F. 546. . . . The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the Act of 1867 (Section 5045, Rev. Stat.) but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule, observed from the creation of our Federal system, should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction.'"

Section 690 of the Code of Civil Procedure, provides:

"(Property exempt from execution or attachment.) The property mentioned in Sections 690.1 to 690.24 inclusive, this code, is exempt from execution or attachment, except as therein otherwise specially provided.

". . . 690.21 (Same: Shares in building and loan association.) Shares of stock in any building and loan association to the value of one thousand dollars.

"690.12 (Same: Shares held by member of homestead association.) The shares held by a member of the homestead association duly incorporated, not exceeding in value one thousand dollars if the person holding the shares is not the owner of a homestead under the laws of this state."

The evidence is clear in the case at bar that the bankrupt is not the owner of a homestead under the laws of California, and that the shares sought to be claimed exempt are shares of stock in a building and loan association, and that the value does not exceed $1,000.00, which

brings the bankrupt squarely under the clear and express language excepting said property from the claim of creditors under California law.

Under California law no time is fixed within which the bankrupt can claim an exemption. He may do so at any time before the filing of petition in bankruptcy and after a levy of an attachment or execution by creditors. The rule is stated in 12 Cal. Jur. 345:

> "A debtor is not required to claim the privilege until an occasion arises whereby the property is liable to be taken away from him. And the privilege exists until he himself, or someone authorized to do so for him, waives it, either in express words or by overt act, or by waiting more than a reasonable time before attempting to claim it. A garnishee, whether a trustee or mere debtor, cannot waive it for him, or deprive him of the opportunity to claim it without being liable to him in damages. What is a reasonable time depends upon the circumstances. An exemption cannot be waived in advance, however, such a waiver being against public policy."

The California courts' attitude in connection with an exemption claim is stated in 12 Cal. Jur. page 332:

> "Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto. And no assumed legislative policy can justify courts in adding to the statutory list of exemptions; yet, subject to this rule—inasmuch as statutes exempting property are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence—the gen-

eral policy now is to construe such statutes liberally so as to carry out the intention of the legislature and the humane purpose designed by the law makers."

Mr. Dudley had the cash in his name in his bank account, he purchased building and loan shares of the value of $1,000 in his name, he had the perfect right to do all of this, and no decision or state or federal statute was violated.

The next step is to claim this property as exempt and again this is permitted by law and no statute is violated.

Creditors extend credit with knowledge of exemption statutes and a trustee in bankruptcy occupies no better position than a creditor holding a judgment.

To permit a denial of exemptions to property that was acquired when a debtor was insolvent, would destroy all exemption statutes, a workman insolvent could not claim wages he earned after he became insolvent, every homestead exemption could be tried out and its validity made to depend on the solvency of the debtor when the property was acquired and when filed. This is not the law of California which the Bankruptcy Court is required to follow.

Mr. Dudley had no home to homestead, if he had he would have been entitled to a larger exemption, he had no wages which he could have exempted, no unemployment insurance to assist him until he could rehabilitate himself. How can it be said he was depriving his creditors of $1,000 and was guilty of fraud, when the courts daily grant larger exemptions as a matter of course.

Conclusion.

Appellant's argument and complaint settles to one premise, that the exempt property was acquired after the debtor became insolvent and when that occurred he became unable to avail himself of the rights given by law. This is contrary to every California decision. See *Jacobson v. Pope & Talbot,* 214 Cal. 758 and *Lucci v. U. S. Credit,* 220 Cal. 492.

Respectfully submitted,

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